Supreme Court, U. S.
FILED
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1437

CAROL C. JOHNSON,

Petitioner,

v.

JOHN J. O'CONNOR AND ELIZABETH J. O'CONNOR,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CONNECTICUT

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BLEED THROUGH

In the

Supreme Court of the United States

October Term, 1975

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Carol C. Johnson,

Petitioner,

v.

John J. O'Connor and Elizabeth J. O'Connor,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CONNECTICUT

To the Honorable Chief Justice of the United States and the Honorable Associate Justices of the Supreme Court of the United States.

Carol C. Johnson, the petitioner herein prays that a writ of certiorari issue to review the judgment of the Supreme Court of the State of Connecticut dated and entered December 16, 1975, docket number 7695, October Term 1974, Superior Court No. 124792.

Opinion Below

The opinion of the Supreme Court of Connecticut, dated December 16, 1975, is unreported and is printed in Appendix A hereto, infra page 1a.

The judgment of the Connecticut Supreme Court is printed in Appendix B hereto, infra page 3a.

The decision of the Supreme Court of the State of Connecticut, denying the petition for rehearing is unreported and is printed in Appendix C hereto, infra page 4a.

Motion for reargument (petition for rehearing), Appendix D, infra page 5a.

The opinion (memorandum of decision) of the Superior Court of Connecticut is unreported and is printed in Appendix E hereto, infra page 14a.

The judgment of the Superior Court of Connecticut is printed in Appendix F, infra page 25a.

Jurisdiction

The court's jurisdiction is invoked under 28 U.S.C. §1257(3) and Supreme Court Rule 19.

The opinion and judgment of the Supreme Court of the State of Connecticut was dated and entered on December 16, 1975.

An authorized and due and timely petition for rehearing was denied under date of January 6, 1976.

The last day for filing the petition for certiorari would have been 90 days of January 6, 1976 namely April 5, 1976 but the last day now is April 12, 1976 an extension of time to April 12, 1976 having been granted under date of March 25, 1976 by an associated justice of the Supreme Court of the United States.

The jurisdiction of the Supreme Court of the United States herein is as provided in 28 U.S.C. §1257. The pertinent and applicable provision reading as follows: "§1257. Final judgment or decree rendered by the highest

court of a state in which a decision could be had, may be reviewed by the Supreme Court as follows: * * * (3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a state statute is drawn in question on the ground of its being repugnant to the Constitution treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the constitution, treaties or statutes of, or commission held, or authority exercised under, the United States.

Question Presented

The question presented is whether the Connecticut State Supreme Court (the court of last resort—the appellate court) has, as claimed by petitioner, so far departed from the accepted and usual course of judicial proceedings and/or has so far sanctioned such a departure by the lower trial Connecticut court as to deprive petitioner of his property by the denial of due process of law and by denial of equal protection of the laws in violation of the due process of law and equal protection of laws clause of section one of the Fourteenth Amendment of the Constitution of the United States.

Constitutional Provision Involved

(Law and Statute Involved)

Petitioner claims and alleges that the judgment made and entered herein by the Supreme Court of the State of Connecticut was and is in violation of due process and equal protection as guaranteed by the Fourteenth Amendment of the Constitution of the United States which, in its pertinent parts reads as follows:

"Article XIV. Section 1. * * * No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Statement of the Case

The trial court herein had before it a case involving the ownership of a triangular strip of land on the west boundary of petitioner's land vital to the maintenance, repair and use of plaintiff's home of 50 years rebuilt in 1930 which could not have been done without the triangular strip and without which the large front stucco house, very difficult to repair, along with the guest cottage in the rear, will be unable to be kept in repair with the possibility that the lives of the occupants of the front house could become endangered forcing evacuation and even before such drastic results curtailing the normal access used since purchase of the premises in 1926 by petitioner and his family to such extent as to cut their value to next to nothing.

Petitioner contended that this triangular strip from 1926 on belonged to his family. The court held otherwise that it had never belonged to petitioner's family but belonged to the neighbors to the west—the Halbe family from 1926 to 1954 then to the defendants from 1954 to the time of this suit.

Petitioner had presented evidence that Mrs. Minnie Halbe's surveyor at her request in 1927 set her land as being on the west of the triangle and placing the triangle in the land of petitioner's family. During all this period petitioner and his family used the triangle as an intergral

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part of their land and contended that if under the court's position it was not their land that they had so used it and therefore obtained title by adverse possession of the triangle from 1926 on.

Both petitioner's family and the Halbe family held under a 99 year lease from a church which owned over 200 parcels of land, out on leases as to which it had promised to sell the fee interest to the leaseholders which it did during the period commencing about 1952.

The Halbe family purchased the fee interest in 1952 and in spite of the Johnson family protest the triangle herein involved was included in the deed but the Johnson family continued their occupancy of the triangle as theirs.

Petitioner herein purchased the fee interest in 1953 (minus the triangle—under protest).

The fee interests were purchased with a clause in the deed that they were subject to the leasehold interests expiring in March of 1967.

Plaintiff's (petitioner's) testimony was to the above effect, namely, that his family had complete control and use of the triangle for the 27 year period from 1926 to 1953 the time the deed was taken and that title had resulted from this adverse possession and that it had continued up to and through the time suit was instituted in 1970.

Defendants' attorney unsuccessfully tried to exclude this testimony as to the 27 year period, 1926-1954, and failing in this attempt then did not cross examine on this point as to that period nor call Mrs. Phyllis Halbe Wagner to testify as to that period although she was available and had lived on the property next door to plaintiff during the period 1926-1954.

Notwithstanding that the testimony was allowed the court refused to take the above stated testimony into consideration by a process which violates the prohibition in the 14th Amendment to the Constitution of the United States that property shall not be taken without due process of law and without equal protection of the laws.

The court in its finding found that the deed to the Halbe family transferred to them the fee interest to the property which the church surveyor had determined to be in the Halbe family's leasehold. The surveyor included the triangle in this property.

The court in its finding found that the deed to petitioner transferred to petitioner the fee interest to the property which the church surveyor had determined to be the leasehold held by petitioner and his mother, his predecessor in interest and as to which the church surveyor had determined that the triangle was never in petitioner's nor his mother's leasehold.

Clearly then the court had found that as to the triangle the church was never the landlord of the petitioner's family as to the triangle.

Then in order to disregard the testimony of adverse possession by petitioner's family during the 27 years (1926-1953) which would have substantiated adverse title in petitioner by 1953 the court set forth its conclusion of law to govern the case reading as follows:

> "70. Possession under a leasehold interest cannot be the basis for adverse possession against the landlord."

With this one fell swoop, the use of the unreasonable conclusion, the court unconstitutionally destroyed petitioner's case.

The conclusion of law flew into the face of its finding of fact in its finding that as to the triangle the church was not and never had been the landlord of any of petitioner's family.

The conclusion violated the axiomatic law of due process and equal protection of laws that a conclusion of law not based in facts found must be reversed. It is only in this case that the Connecticut Supreme Court—its appellate court—refused to apply this mandate and thus refused to apply the law equally but acted in violation of due process and the constitutional prohibition in Section 1 of the 14th Amendment.

Former Connecticut Chief Justice Maltbie in his highly esteemed work entitled "Appellate Procedure" sets forth at page 205 (second edition) the following (in reference to due process requisites as applied to conclusions):

> "Brief statements of the principle upon which conclusions are reviewed are that they cannot stand if they are legally or logically inconsistent with the subordinate facts or if they involve some erroneous rule of law material to the case or if they are unreasonably drawn from the facts found."

And again, page 8:

> "It is an error of law for a trial court * * * to find * * * a conclusion not legally, logically or reasonably supported by the facts it has found."

Although the former Chief Justice was writing as to Connecticut law it is in fact a statement of fundamental law throughout the United States set up as a standard guide as to what constitutes due process and equal protection of the laws.

Petitioner (plaintiff-appellant) could not have anticipated such a disregard of the constitutional prohibition by the Appellate Court finding "no error" and thus deciding to condone the violation. Petitioner, as allowed by Connecticut law promptly and duly and timely filed a petition for rehearing and in the petition pointed out the violation and the Appellate Court was asked to grant the petition so that it would not be in the position of condoning the violation of due process of law and equal protections of the laws provision of the Constitution of the United States.

The constitutional questions were raised at the trial and appellate level both before and after the appeal hearing.

In plaintiff's "Request for Finding" the following are set forth.

> "The questions of law that he (plaintiff-appellant) desires to have reviewed are:
>
> "5. Did not the court's action in unreasonably, arbitrarily and/or illegally refusing to give credit to the undisputed and uncontradicted testimony on behalf of plaintiff of his adverse possession and user of the triangular parcel of land involved herein deprive plaintiff of due process of law, contrary to the Constitution?
>
> "6. Did not the court's action in arbitrarily, illegally and or in abuse of its legal discretion in refusing to give credit to the undisputed and uncontradicted material testimony on behalf of plaintiff of his adverse possession and user of the triangular parcel of land involved herein deprive plaintiff of equal protection of law contrary to the Constitution of the United States and the Constitution of the State of Connecticut? (Record page 27).

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"12. Did not the court err in holding that since a leasehold held by plaintiff could not be the basis for possession against his landlord (the church, the fee owner) as to property so leased to plaintiff that the plaintiff could not acquire adverse possession against other and different property as to which the church was the landlord, namely, the property next door to the West which happened to be owned by the church but leased to another person living next door to the west? (Record page 29).

"30. Did not the court err in finding certain facts from subordinate facts which do not support the finding of such facts so found as above set forth nor support the judgment? (Record page 35).

"33. Were not plaintiff's several claims of law, as set forth in the draft finding annexed hereto, claims which correctly designated the law to be applied herein which the court committed err in rejecting? (Record page 35).

"36. Did not the court mistake the law when it held the law to be that no acts of plaintiff or his predecessor in title, his mother, between 1926 and 1967 could be counted towards plaintiff and his mother establishing adverse possession and user by their acts of that nature during such period even though their acts were as to the triangle which the church by its deed claimed was outside of their leasehold. Such acts were therefore directed not against their landlord as the church claimed that they were not plaintiff's landlord as to the triangle. The acts of plaintiff and his mother were therefore directed against all the world as to the triangular parcel of land? (Record page 36).

"37. Did not the court act illegally, arbitrarily and/or unreasonably in abuse of its legal discretion

in refusing to consider the evidence of adverse possession and user as to the triangle where such evidence pertained to actions, possessions and user prior to 1967? (Record page 37).

"38. Did not the court act illegally, arbitrarily and/or unreasonably in refusing to consider the evidence as to adverse possession and user where such possession and user occurred prior to 1967 whereas their was undisputed evidence of such adverse possession and user from 1926 to the institution of suit in August 1970? (Record page 36).

"136. (Claim of Law) For the court to adopt a rule of law that nothing prior to 1967 as to adverse possession or user was to be counted in incorrect law as to this case and adversely affected the substantial and constitutional rights of plaintiff and deprives him of due process of law and equal protection of the law in contravention of the Fourteenth Amendment of the Constitution of the United States and the Constitution of Connecticut." (Record page 69).

The court in its finding found as follows:

"3. The church, the fee owner, the primary landlord, caused it to be known that at the end of the 99 year leaseholds, or perhaps even sooner, it would sell the then leaseholders the property as to which they held their respective lease and this plan was carried out and the sale time was accelerated commencing shortly after a survey by its surveyor, Charles H. Miller, which survey was made in 1950. (Record page 74).

"4. After the 1950 survey was completed, the church commenced to sell each of the then lessees the

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fee to what, from Mr. Miller's survey, was determined to be the respective leaseholder's property subject to said leases. (Record page 75).

"7. The plaintiff is the owner of Lot 47 (this does not contain the triangle) and the defendants are the owners of contiguous Lot 48 (this does contain the triangle). (Record page 75).

"17. On the basis of the subdivision maps, deeds of the remainder interests for each lot were prepared by The Ecclesiastical Society, so that an offer to sell remainder interests to the existing leaseholders could be made. (Record page 77).

"18. On July 2, 1953, The First Ecclesiastical Society of Branford conveyed to the plaintiff its interest in Lot No. 47 bounded and described as follows: (the description does not include the triangle). (Record page 77).

"27. On July 30, 1952 The First Ecclesiastical Society conveyed to Phyllis Halbe Wagner its interest in Lots No. 48 and No. 48a bounded and described as follows: (this description includes the triangle)." (Record page 80).

The court in its finding as above shown found that as to the triangle plaintiff never held it and never at any time had any landlord-tenant relationship as to the triangle.

Then instead of drawing its conclusion from the facts found, the court unconstitutionally arrived at the following conclusion of law to govern the case:

"70. Possession under a leasehold interest cannot be the basis for adverse possession against the landlord."

The court in its memorandum of decision set forth the same (Record page 19) with the following addition:

> "At best the adverse possession claim could not have commenced until July 2, 1953, when the plaintiff received the landlord's deed of the remainder or reversionary interest."

Obviously the court could not come to such a conclusion as it had found that the plaintiff was never the tenant of the church as to the triangle, but it was in this way that the court turned its back and refused to consider the testimony that the plaintiff had complete control through adverse possession of the triangle from 1926 to 1953, a 27 year period.

The court's action was a direct violation of the 14th Amendment of the Constitution of the United States by depriving plaintiff of due process of law and the equal protection of the laws.

The court further set forth as overruled plaintiff claim of law in his Finding 91 which was as follows:

> "The plaintiff's claim of adverse possession and adverse use should not be restricted to the period from 1953 but goes back to 1926 and from then on through the commencement of suit herein in 1970."

Plaintiff in his assignment of errors set up the court's error in plaintiff's assignment number 3 reading as follows:

> "(The court erred) 3. In refusing to include plaintiff's claim of law 136 and rejecting claim of law 89 set up in the court's finding as Finding 91 (quoted above) and overruled."

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Plaintiff further alluded to the court's conduct complained of in No. 14 of his assignment of errors reading as follows:

> "14. Further, the court erred in wholly disregarding the testimony of plaintiff and his witnesses in open court and in distorting such testimony such as in its memorandum of decision and finding, all in abuse of its legal discretion and in violation of due process and equal protection clause of the Fourteenth Amendment of the Constitution of the United States and in violation of the court's duties and obligations as a judge."

Plaintiff followed this through in its brief on appeal.

The court in effect made findings covering less than half of the case. In spite of the fact that the Appellate Court's attention was called to the unconstitutional action of the trial court the Appellate Court rendered judgment of "No Error" and by so deciding made itself a part of the unconstitutional action by condoning it. Its action speaks as clearly as if it had expressly so adjudicated and was its answer to the constitutional question raised on the appeal.

No attempt was made to classify the error as "immaterial". It was an affirmance of the trial court's unconstitutional action of drawing conclusions of law to govern the case which had no substantiation in the facts found.

The blanket criticism of plaintiff was not justified as plaintiff had in the brief advised the court of an injury to his eye which would force him to rely upon developing the legal questions raised and to stand on the point that the court's finding of facts in its finding had no basis in

the testimony and that defendant's brief had shown no substantiation.

The reply brief of plaintiff closed as follows:

> "It is respectfully submitted that the procedure of the trial court in the distorting of the testimony and the rejection of applicable law presents to this Court (referring to the appellate court) a finding by the trial court so grossly at variance with the fundamentals of judicial procedure and justice as to amount to an illegal action constituting an error of law and violation of constitutional rights as justifies the correcting of the finding and judgment for plaintiff."

This was followed up in the petition for rehearing, which the court denied without comment.

In this petition for rehearing the federal question was presented to the court with the request that a hearing be had so that it would not be in position of condoning the unconstitutional action of the trial court.

Reasons for Granting the Writ

Certiorari should be granted for the following reasons.

An arbitrary unreasonable violation of the Constitution of the United States by violating its prohibition against taking property without due process of law and by denying equal protection of the laws as has been done herein as set forth in the "Statement of the Case" deserves investigation as to this claim since the court has jurisdiction.

Mr. Justice Cardoza has written in the case of *Morningstar* v. *Lafayette Hotel Co.*, 211 N.Y. 465, 468:

> "A great jurist, Rudolf von Ihering, in his 'Struggle for Law' ascribes the development of law itself to the

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> persistence in human nature of the impulse to resent aggression and maintains the thesis that the individual owes the duty to himself and to society never to permit a legal right to be wantonly infringed."

He adds,

> "It is no concern of ours that the controversy at the root of this lawsuit may seem trivial."

But it would seem that the violation of any right of a citizen guaranteed to him by the Constitution of the United States can never be classified as trivial.

To allow to stand unchallenged such illegal disregard for the Constitution's insistence on the use of due process and equal protection of the laws would result in serious hinderance to the effective administration of the law in one of its most vital aspects even perhaps the most vital.

This concern for justice was shared by Chief Justice Hughes as is seen in the comment in 63 Harvard Law Review 5, 13. Of Mr. Justice Hughes it has been said that:

> "He was interested in preventing grave miscarriages of justice, and occasionally he would recommend the grant of certiorari in a case of no public importance whatever simply because the decision was unjust, unreasonable or plainly wrong."

In the case of *Thompson* v. *Louisville*, 362 U.S. 189, certiorari was granted and a conviction to be satisfied by a $20 fine was reversed.

In that case it was held that standing alone and shuffling one's feet to music on the floor in the vicinity of a bar of a public cafe, not objected to by the management, while waiting for a bus did not amount to loitering with-

out account of one's self and that thereafter verbally protesting one's arrest for same could not justify conviction for disorderly conduct with the imposition of a fine of $10 on each charge. Such conviction was held invalid under the due process clause of the 14th Amendment.

But it upset the individual so much that he went to great trouble to obtain a stay so that the case would not become moot and litigated the matter. This is in line with the quotation cited by Mr. Justice Cardoza.

It is true that such a conviction could cause mental anguish and if not challenged perhaps someone else might find himself in the same situation.

In this case the mental anguish of losing a strip of land used for 50 years and which was essential to the rebuilding of petitioner's home in 1930 and which is still essential to keeping the stucco house in repair the lack of which could endanger the occupants and cause forced evacuation, can also be great. The rear guest house will in a lesser degree suffer the same way and access to and from the rear yards becomes reduced to a minimum even for walking much less bringing in repair material as in the past.

It is axiomatic in the law that in a finding the conclusions of law therein must be based on and have substantiation in the facts found in the finding and not, as herein be disregarded as not controlling.

Where such arbitrary disregard for due process and equal protection goes unchecked it will not be long before citizens will lose confidence in the Constitution and in obtaining justice by resort to the courts.

Here testimony as to 27 years of occupancy was completely disregarded by the court's irrational conclusion in violation of the Constitution.

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CONCLUSION

For the foregoing reasons, it is respectfully suggested, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDICES

Appendix A

Opinion of Supreme Court of Connecticut

SUPREME COURT OF CONNECTICUT

DECEMBER TERM, 1975

No. 7695

CAROL C. JOHNSON,

v.

JOHN J. O'CONNOR ET AL.

Action for a judgment determining the rights of the parties to a parcel of land, brought to the Superior Court in New Haven County and tried to the court, *Irving Levine, J.;* judgment for the defendants and appeal by the plaintiff. *No error.*

Carol C. Johnson, of the New York bar, pro se, the appellant (plaintiff).

James O'Connor Shea, for the appellees (defendants).

PER CURIAM. This is an appeal by the plaintiff from a judgment for the defendants rendered by the Superior Court for New Haven County in an action in which the plaintiff claimed a judgment that he was the owner in fee of a triangular parcel of land lying between other property owned by him and land of the defendants or, in the alternative, that he owned a right of way or easement over the parcel. The court concluded that "[t]he plaintiff has failed to establish by a preponderance of the evidence his claims that he had acquired title by adverse possession to the triangular plot of land abutting his land on the

west and belonging to the defendants, and, in the alternative, that he had acquired a prescriptive right-of-way or easement over the same premises." It, accordingly, found the issues for the defendants and rendered judgment.

On his appeal, the plaintiff assigned error to all but two of the court's sixty-one findings of fact, to all twenty of the court's conclusions, and to the court's refusal to find sixty-one of the sixty-four paragraphs of the plaintiff's draft finding. The appendix to the plaintiff's brief consists of the following two sentences: "Plaintiff requests the Court to consider the whole transcript of the testimony as the appendix as if fully set forth herein. Copies of the transcript will be submitted to the Court at or before the hearing." The transcript is 399 pages in length.

Our frequent strictures against such sweeping attacks on the finding of a court and disregard of the rules of appellate procedure need not be reiterated.

It suffices to note that the decision in the case depended in large measure upon the credibility which the court placed on the testimony of the witnesses. Despite the sweeping attack, the court's finding of fact is not subject to material correction and amply supports the conclusion of the court that the plaintiff failed to prove the essential allegations of his complaint and the facts and circumstances which must be proved to establish a right by adverse possession or prescription. See *Arcari* v. *Dellaripa*, 164 Conn. 532, 536, 325 A.2d 280; *Andrzejczyk* v. *Advo System, Inc.*, 146 Conn. 428, 431, 151 A.2d 881; *Aksomitas* v. *South End Realty Co.*, 136 Conn. 277, 281, 70 A.2d 552.

There is no error.

December 16, 1975.

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Appendix B

Judgment of the Connecticut Supreme Court

STATE OF CONNECTICUT

SUPREME COURT AT HARTFORD

First Tuesday of December, 1975

#7695

CAROL CLEMENT JOHNSON, of the City and County of Albany, State of New York and of Branford, Connecticut,

vs.

JOHN J. O'CONNOR AND ELIZABETH J. O'CONNOR, both of the Town of Branford, County of New Haven.

JUDGMENT

This appeal by the plaintiff from the judgment of the Superior Court at New Haven was filed with the Clerk of said Court on the 11th day of September, 1973, and said appeal came thence to the 19th day of August, 1974, when the appellant filed his assignment of errors, as may appear in the certified transcript of record on file in this Court, and said appeal came thence to this Court at its term held at Hartford on the first Tuesday of October, 1974, and thence to the present term when the parties appeared and were fully heard.

And now this Court finds there is no error.

Whereupon it is adjudged that said judgment be confirmed and established, and that the appellees recover of the appellant costs taxed at $300.00.

Date of Judgment: December 16, 1975.

By the Court,

NICHOLAS J. CIMMINO
Clerk

Appendix C

Decision of Supreme Court of State of Connecticut Denying Petition for Rehearing

Denial of Petition for Rehearing endorsed on back of Judgment of the Supreme Court—Judgment dated December 16, 1975.

No. 1695

CAROL C. JOHNSON,

v.

JOHN J. O'CONNOR ET AL.

January 6, 1976

The plaintiff's motion to reargue is denied.

By the Court,

HOUSE
Chief Justice

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Appendix D

Motion for Reargument of Appeal

#7695

SUPREME COURT—HARTFORD

December 22, 1975

#124792

SUPERIOR COURT—NEW HAVEN COUNTY

December 22, 1975

CAROL CLEMENT JOHNSON,

vs.

JOHN J. O'CONNOR ET AL.

The decision on the appeal herein is devoid of any discussion of the law applicable to the case herein. The Trial Court and the Supreme Court was presented with the question as to whether a 99 year lease tenant from a landlord, who had at about the same time made a 99 year lease with another tenant, could by adverse possession acquire title against and to property contained in the second lease during the 99 year lease period.

The Trial Court had found as a fact that in this case the Church, the common landlord, had determined to have its surveyor delineate the various lease holdings as of 1950 when he made his survey and that the Church then proceed to sell the interest remaining in the landlord-Church (as to each surveyed lease) to the tenant of the

surveyed leasehold (More particularly Court's Finding 3, Record page 74, Finding 4, Record page 75, Finding 13, Record page 76, Finding 17, Record page 77, Finding 23, Record page 78, Finding 24, Record page 79.

The Court found that the triangular parcel of land in dispute was not within the plaintiff's leasehold, Finding 33, Record page 82 and those preceding.

The Trial Court then concluded (conclusion 70, Record page 87, that "Possession under a leasehold interest cannot be the basis for adverse possession against the landlord." A conclusion directly in conflict with its finding that the triangular land in question was not in plaintiff's leasehold from the Church.

The Trial Court thus having erroneously reached such conclusion followed its statement in its Memorandum of decision that "At best the adverse possession claim could not have commenced until July 2, 1953 when the plaintiff received the landlord's deed of the remainder or reversionary interest" (Record page 19 at bottom), and proceeded on the theory that such was the law to be applied to this case and that from 1926 when the plaintiff and his mother took possession of the leasehold interest they could not originate adverse possession of the triangular parcel of land, abutting on the west side of plaintiff's leasehold AS TO WHICH THE CHURCH WAS NOT THE LANDLORD OF THE PLAINTIFF, and the Trial Court then proceeded to ignore all testimony of adverse possession from 1926 to July 2, 1953.

Clearly the Trial Court determined that it would not take into consideration plaintiff's testimony that he had the use and full control of the triangle from 1926 thru 1953 and chose only to consider the situation of plaintiff's possession subsequent to 1953 at the earliest.

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Appendix D

The four cases cited in plaintiff's brief and submitted in full to the Supreme Court clearly show that the English House of Lords in a fully developed opinion affirmed the English Court of Appeals in an equally extensive opinion, both well reasoned, and held that the first tenant could obtain adverse possession against the land held by the second tenant (both 99 year leases) and the fact that they had a common landlord did not stop this.

Surely the English Courts which have given the United States its property law are entitled to great respect. The four cases stand out in the law. The Fairweather vs. St. Marylebone Property Co., Ltd., and Fairweather Case appealed reported respectively in [1962] 2 All. E.R. 288 and 3 All. E.R. [1963] are landmarks in the law pertaining to such cases as are herein involved, and lead right in to Connecticut Statute 52-575 pertinent to this case. Time and again the Connecticut courts have set forth the connection of Connecticut land law with the English land law. Surely the Supreme Court could not have studied these cases and not seen their repudiation of the Trial Court's claim of applicable law and that the Trial Court's claim of law to be applied is not the law to be applied WHERE THE ADVERSE POSSESSOR IS NOT THE TENANT OF THE LANDLORD AS TO THE LAND BEING ADVERSELY POSSESSED, in this case the triangular parcel of land.

Plaintiff because of an injury to his eye had to limit his application to the points involved and did concentrate on this question of law practically to the exclusion of the other points raised on the appeal although many of the Findings were shown to be without support in the evidence.

The Court's ruling that upon ALL THE EVIDENCE invited the scrutiny of the entire record and to have tried to set forth all the facts in support of the appeal would

have practically required the printing of the entire record and the Court would have been faced with a burden more time consuming than the reading of the record and seemed to be more in harmony with Judge Maltbie's statement in his book that at times this is necessary to arrive at the truth.

The four cases set forth in plaintiff's brief were therefore submitted, one copy for each of the Court, without comment on the Xeroxed Copies only with comment in the brief and as stated would be done in the brief, in order to make them more accessable to the Court and because the cases thoroughly discuss and dispose of the legal questions herein involved. Yet the opinion gives no indication that they were ever read much less differentiated in any way. Yet there can be no question that the Trial judge while holding that plaintiff was never the tenant of the landlord as to the triangle then proceeded to apply his conclusion that "Possession under a leasehold interest cannot be the basis for adverse possession against the landlord" which has no application to this case, since there was no landlord tenant relationship between the Church and plaintiff as to the triangular parcel of land according to the Trial Court's finding.

The Trial Court's application of non-applicable law to this case has resulted in the unconstitutional deprivation of plaintiff of his property and it is seriously requested that the appeal be reviewed so that this Supreme Court will not be in the position of condoning such unconstitutional action.

Plaintiff completely proved his case. He testified that he had complete control and possession of the triangular area from 1926 thru the period that the Halbes there next door namely thru their residence until 1954 (Transcript

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pages 185, 184, 183). The attorney for the defendants objected but the testimony stood, yet he did not cross examine the plaintiff on this testimony nor did he bring into court and put on the stand Phyllis Halbe Wagner who lived to the west of plaintiff from 1926 thru 1953 although she was available, living only a few miles away from the triangular area, living in Branford. The defendants testified that they did not know anything as to plaintiff's occupation of the triangle from 1926 up to the time that they purchased their property from the Halbe potential witness that their attorney did not call to the stand, and who could have given testimony from 1926 on to the time she sold and left the immediate neighborhood in 1954. Plaintiff's testimony was therefore left admitted, undisputed and uncontested without cross examination on that testimony. The attorney apparently knew that his only chance was to stay clear of the 1926 to 1954 period.

Plaintiff respectfully requests this Court to grant a reargument so that the matter pertaining to the above may be fully brought to the attention of the Court so that it may decide as to the law applicable to this case and that the request that the Trial Court's error of law should be reversed and judgment rendered for the plaintiff on the uncontested and undisputed and conceded thru non cross examination and non confrontation by available witnesses be granted or at least that a new trial should be ordered wherein plaintiff will have a witness who quite recently came up to him and told of his using the way up the triangle for deliveries to the rear part of plaintiff's property even before plaintiff's family moved in so that the correct law may be applied.

In addition to the above it should be noted that Findings 1 thru 35 are used to show that the plaintiff was

never the tenant of the Landlord as to the triangular parcel of land.

Findings 36 to 39 are used to show that the plaintiff could use another altho less desirable and restricted way which is no argument that the plaintiff did not use the triangle way. The law is clear that use of another way does not affect getting adverse possession of the way claimed. There is no testimony to sustain the finding in 39 that plaintiff used the trash cans of his tenant kept on the west side it is rather an argument that he would use the triangle way except at night when he arrived by automobile, on the track leading to the garage on the east side of the front house.

As to Findings 40 to 42. Plaintiff claimed complete use and there was no testimony of the Halbe's to the contrary for the period 1926 to 1954.

As to Finding 43. Plaintiff testified that during the Halbe time that the grass was cut to the red line, there was no controdiction.

As to Finding 44. There was no testimony that the Halbes used the triangle so that exclusion would be called for.

As to Finding 45. The rear fence was not established as to the boundary line of the triangle principally because the triangle at that point is so narrow that it could only be done by a survey.

As to Finding 46. That the tract in the triangle was not leased out does not mean that the tenants did not use it under plaintiff as the tenants so testified that they did and plaintiff was not going to land lock himself, but did invite the tenants to use the triangle area.

As to Finding 47. The user of the triangle by plaintiff was admittedly seen by the defendants and open to the

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general public to see adverse possession does not mean informing the general public by word of mouth.

As to Finding 48. There was no offer to buy the triangle and there is no testimony to support such a finding. The defendant testified that the offer was as to land between the buildings. The defendant owned land between the buildings west of the triangle. The female defendant said the offer was as to land and did not specify that it was land within the triangle and neither used the word threatened as used in the finding. Transcript 317, 318, 361.

As to Finding 49. All cases say that fencing is not necessary. If there is fencing it may have some significance. The lack of fencing here is of no significance herein as it would have obstructed the view of the waterfront.

As to Finding 50, 51 and 52. No path is worn in waterfront grass, and one need only look at a grass tennis court or golf course to see how grass stands up.

As to Findings 53 to 61. These findings mention only the defendants during the 1954 to trial time that they were in the picture the judge rejects the 1926 to 1954 period so he makes no mention of the Halbe period. No statement that the Halbes used it, the triangle, or that they had a right to use it or that they made any such claim nor in any conveyance to the defendants is there any mention as to what footage they transferred and the attorney for the defendant studiously avoided putting in the footage of the Halbe leasehold, so from 1954 to 1967 we do not know what footage of leasehold they got.

As to Finding 54 and 55. There is no reference as to what footage they paid taxes on.

Appendix D

As to Finding 56. There is no reference as to whether the Halbes put stones in front of their property and if so where they ran from.

As to Finding 57. There is no reference to where the Halbes sat nor is there any claim or testimony that they used the triangle.

As to Finding 58. There is no testimony nor reference as to the Halbes making any attempt to have the plaintiff not use the triangle. (Just the contrary Mrs. Minnie Halbe had the Lawrence (the red line) set by her surveyor.)

As to Finding 59. Nor is there any testimony that the Halbes had flowers in the triangle.

As to Finding 60. There is no finding that the Halbes got rid of the Dandelions, in fact they must have done nothing because the dandylions were there when the defendants arrived.

As to Finding 61. There is no finding that the Halbes were unaware of plaintiff's claim, just the contrary, Mrs. Halbe as above stated had the Lawrence (the red line) set and in 1950 Mr. Bailey, the Church representative was told of the plaintiff's claim to the red line and the tree and he said, How do you know that the line does not run east from the tree."

Clearly the Court disregarded the period 1926 to 1954 under the false law that since the plaintiff owned land adjacent to the triangle that it could not acquire adverse possession outside of the land eastward of the triangle so he threw out all of the testimony as to the period 1926 to 1954. The Court's Finding makes clear that the Trial Court understood that the Plaintiff was not the tenant of the Church as to the trianguler parcel of land, as it had so found.

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Appendix D

Since the decision was only received when the plaintiff returned on Monday, December the 22nd in order to get this motion in by Thursday, December the 26th with the holiday, Christmas, intervening and with mails so slow it is not possible to give more time to carrying the above further and it must go as is.

It is respectfully requested that this request be granted otherwise plaintiff will be in serious jeopardy of losing his house as there must be continued access as during the past 50 years back to 1926 for repairs and even rebuilding parts of the house.

Respectfully submitted,

CAROL C. JOHNSON
Plaintiff-Appellant

Appendix E

Opinion Memorandum of Decision of Superior Court

SUPERIOR COURT—NEW HAVEN COUNTY

No. 124792

CAROL CLEMENT JOHNSON,

vs.

JOHN J. O'CONNOR ET AL.

JUNE 21, 1973

This action in two counts has been instituted by the plaintiff landowner claiming in the first count a certain triangular strip of land from his abutting owner by virtue of adverse possession and in the second count a prescriptive right of way over the same premises if his claim in the first count is not successful. The parties are owners of contiguous lots 48 and 47, as shown on a map entitled "Map 2 Property of the First Ecclesiastical Society of Branford, Indian Neck, Branford, Conn., dated March 1st, 1950, prepared by Chas. H. Miller, Registered Engineer", on file in the Branford Town Clerk's Office as map #710. The plaintiff, owner of Lot 47, claims a triangular strip of land, which is a part of the defendant's lot 48 as shown on said map. The parcel begins at the common north boundary of both lots and the easterly leg of the triangle running southerly is the westerly boundary of the plaintiff's lot 47 as shown on said map. The westerly leg runs from the aforesaid common northerly starting point or apex in a

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southerly direction to a point which is 12.3 feet westerly of the easterly leg of the triangle as measured on the northerly side of Linden Avenue, on which both lots front and which forms the base of the triangle. Both plots of land were originally leased from the First Ecclesiastical Society who quitclaimed them to the lessees in July of 1952 and 1953, Lot 47 to Carol Clement Johnson, the plaintiff, who had received an assignment of the leasehold from his mother who held it since 1926, and Lot 48 to Phyllis H. Wagner, a former lessee, who conveyed to the defendants on October 1, 1954. When the plaintiff received the deed to his land he complained to a Mr. Bailey who represented the grantor Church that his westerly line was wrong and that it should run to a tree or tree stump on the far side of Linden Street which would be the same westerly line as he is claiming in this action. The map aforementioned indicates a sixty foot frontage of the plaintiff's lot on Linden Avenue as does his deed from the Church. However his claim to seventy-three feet is not helped by the conveyance of the leasehold interests in those premises by a predecessor in title to his mother which describes the lot as having a frontage of fifty-three feet on Linden Avenue. He was told by Bailey that if he did not accept the description as stated in his deed, he would get nothing and that meant losing the buildings which the tenants had erected on the lot. The Church's survey of its land by Charles Miller in 1950 showed all of their property divided into approximately ninety-six lots, which included the two involved herein. Mr. Miller testified that in order to draw the lot lines he referred to usage of the leaseholds, and the installation of fixed objects such as fences. He further testified that he did the best he could, he tried not to hurt anybody, and where there were no physical indications, he

used his own judgment, which was the case with lots 47 and 48. Lot 47 was monumented in 1957 or 1958 and monuments have been located which show the plaintiff's lot's southwesterly corner at a point which coincides with the original description in his deed, rather than the point 12.3 feet westerly thereof. It is Mr. Johnson's claim that a survey in 1927 for a Mr. Halbe, a predecessor in title of the defendant, set out the westerly boundary of Lot 47 at the point westerly 12.3 feet of the corner as shown on the Ecclesiastical Society Map and that since 1926 a line of shrubs and flowers about five feet in width, extending westward from the westerly wall of their southerly building, has existed. The plaintiff's premises contains two dwellings, one behind the other. It should be pointed out that the width of the shrubbery has been estimated by various witnesses from a minimum of two feet to a maximum of seven feet. The plaintiff further claims that he and others constantly used the westerly side of their premises for getting from the front or southerly boundary to the rear or northerly boundary and that it was his means of access to his rear house, and that when the house was stuccoed the area was used by workmen as it was on four other occasions when a deck was tarred as well as by other repair men. He further claims that he always mowed the triangular piece up to the line 12.3 feet westerly of his mapped westerly line. Although the plaintiff has lived in Albany, New York since 1963, he claims to have used the parcel of land for access by foot at least eleven times a day, three or four days a week. He further claimed that the Halbes, the defendant predecessor in title never mowed the property in question, nor did the defendants or their tenants. He further claims no notice was ever given him by the defendant under Sections 47-38 and 47-39 of the General Statutes to stop ad-

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verse possession. The plaintiff states that his easterly line as shown on the Church's map is correct, and the exhibits indicate that the southerly line of his lot is sixty feet on Linden Avenue in the Church's deed to the plaintiff as is the Church's map, and that the deed of the leasehold interest to his mother in 1926 contains a linear description of fifty-three feet on Linden Avenue and that he has always paid his taxes based on the sixty foot front line, which does not include the property in question. The rear house on the plaintiff's lot has a walkway which leads from the center of the front in an easterly direction to the easterly side of the lot, which is on the opposite side of the parcel the plaintiff claims, and which can be and has been used for passage from the rear to the front of the lot. The plaintiff admits he never had complete use and control of the property in question since 1953 when he got his deed. The tenant of the plaintiff's front house has seen the plaintiff using the area for access to the rear house which he occupied and stated that the triangular piece was moved by her sons who were employed for that purpose by the plaintiff, although she does admit that the defendants' man also mowed the area and the defendants' children played there, and also that the plaintiff used the easterly side of the lot for access to the rear house on occasions. One of the plaintiff's tenant's sons testified he mowed on the westerly side of their house and that the defendants mowed only about one-half of the property in question. He further testified that the defendants used the area constantly. He also said no boundary was ever pointed out to him by anyone, up to which he was to mow. Essentially his testimony was that the area was shared by the plaintiff and defendants.

The defendants produced evidence that they had their mowers cut right up to the stone marker which is the monu-

ment at the southeasterly corner of the defendants' lot as shown on the Church map and that they mowed up to a point roughly about four feet westerly of the westerly wall of the plaintiff's house. The O'Connors always pointed out this marker as the point up to which to cut for all their mowers. All of the O'Connor mowers cut up to the point on Linden Avenue at which a large stone bird bath has long been in existence and that stone coincides approximately with the marker or monument previously mentioned. The defendants maintained until 1969 a line of painted white stones on their Linden Avenue boundary extending right up to the plaintiff's southwesterly corner. The abutting property owner on the plaintiff's easterly line has seen the plaintiff pass on the easterly side about six times each day. The defendants' immediate predecessor in title, a Mrs. Wagner, who was a daughter of the Halbes from whom she got the property, pointed out the marker at the plaintiff's southwesterly corner at the time the defendants bought the property as being on the property line. Mr. O'Connor states that he did some mowing himself and he cut the area in controversy and used it to get from the front to the rear of his lot, and up until 1966 he kept painted white stones on the Linden Avenue property line extending right up to the marker or monument previously identified herein. He further claims that the plaintiff, about nine years ago, asked to buy the strip of land between their respective houses which is the area in question and when he refused the plaintiff threatened that there were other ways to get it. The O'Connors also claim to have used the area in question for passage, sunning in their own chairs, cookouts, repairs to the house, and Mr. O'Connor states that he ordered Johnson off the area on at least one occasion. In 1960 he built on the side of his house a rear stairway and in 1967 or 1970

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a similar front stairway extending almost up to the contested area. Mrs. O'Connor states that in 1959 when they bought their property, the marker was at the corner of the two properties in accordance with the linear measurements of both lots and that she maintained rose bushes and a lilac bush and always used the land up to the stone bird bath which would be at the marker on Linden Avenue. She further adds that they got rid of dandelions, fertilized and pruned the contested area without interference from anyone. She does say the plaintiff walked in the contested area and that was all he did and that from 1967 on he used it about two or three times a day.

The parties agree that this suit does not concern itself with a disputed property line except insofar as that line is affected by the claim of adverse possession.

At the outset it should be noted that both the plaintiff's and defendants' estates in their premises were leasehold interests from the First Ecclesiastical Society, and had been so from the first grant in 1866 or 1867. The O'Connors' predecessor in title, a Mrs. Wagner, received a quitclaim deed from the Society on July 30, 1952 and the plaintiff received the same type of deed from the Society on July 2, 1953. Ordinarily on the dates mentioned the leasehold interests and the interests conveyed by the Society would have merged so that each party would have had a fee simple. 51C C.J.S. 310, §94; 51 C.C.J.S. 669, §257. However, if there is a clear intention that the merger shall not take place, it does not occur. 51 C.C.J.S. 670, §257. In both deeds from the Society, the transfers are made subject to the leases of record and an express provision is written in to continue in effect the rights of the Society under the leases including its right to receive rent. It therefore follows that no mergers occurred in 1952 or 1953 and the

parties both continued to hold their respective properties subject to leasehold interests until such interests expired in 1966 or 1967. Possession under a leasehold interest cannot be the basis for adverse possession against the landlord. *Camp* v. *Camp*, 5 Conn. 291; *Ricard* v. *Williams*, 20 U.S. 59, 5 L. Ed. 398, 410; *Schroeder* v. *Tomlinson*, 70 Conn. 348, 357. At best the adverse possession claim could not have commenced until July 2, 1953 when the plaintiff received the landlord's deed of the remainder of reversionary interest.

"The essential elements of an adverse possession sufficient to create title to land in a claimant are that the owner shall be ousted of possession and kept out uninterruptedly for fifteen years by an open, visible and exclusive possession by the claimant under a claim of right with intent to use the property as his own and without license or consent by the owner. Goldman v. Quadrato, 142 Conn. 398, 402, 114 A.2d 687; Bridgeport Hydraulic Co. v. Sciortino, 138 Conn. 690, 695, 80 A.2d 379; Palmieri v. Bulkley, 137 Conn. 40, 42, 74 A.2d 475; Schroeder v. Taylor, 104 Conn. 596, 605, 134 A. 63. The requisite of exclusive possession for the statutory period is not met if the adverse user merely shares dominion over the property with other users. Short Beach Cottage Owners Improvement Assn. v. Stratford, 154 Conn. 194, 199. 224 A. 2d 532." *Arcari* v. *Dellaripa*, Vol. 34 C.L.J. No. 41, p. 14 (April 10, 1973). See *Lake Garda Improvement Assn.* v. *Battistoni*, 160 Conn. 503, 509. The burden of proof is upon the plaintiff to establish title by adverse possession. *Barrs* v. *Zukowski*, 148 Conn. 156, 165; *Lowenberg* v. *Wallace*, 147 Conn. 689, 699. "Whether possession is adverse is a question of fact for the court." *Barrs* v. *Zukowski*, supra 186; *Padula* v. *Padula*, 138 Conn. 102, 110. Upon all the evidence the use

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made of the disputed land by the plaintiff was not open, visibile and exclusive nor did it constitute an ouster of the defendants, who were never out of possession of the triangular parcel. Viewing the evidence in the plaintiff's more favorable light, at best he only mowed or had mowed a portion of it and that same portion was mowed by the defendants. The shrubs and flowers in the area were maintained by the defendants, not the plaintiff. He passed and repassed over some indefinable portion of the disputed triangle and again, this same indefinable portion was used for passage, sun bathing, outdoor cooking and just plain sitting by the defendants. His use of the area for passage can hardly be defined as a claim of title inasmuch as the plaintiff had lived in Albany for the past ten years and he has only used the area on a part time basis as a summer house and certainly not during the cold months. The plaintiff has failed to prove by a preponderance of the evidence his open, visible, notorious, adverse, exclusive, continuous uninterrupted use under a claim of right. *Marquis* v. *Drost*, 155 Conn. 327, 331. "The doctrine of adverse possession is to be taken strictly. Such a possession is not to be made out by inference but by clear and positive proof. Huntington v. Whaley, 29 Conn. 391." *Robinson* v. *Myers*, 156 Conn. 510, 517. There never was any physical indicia of his claim to possession, it does not appear that plaintiff fenced in the area, warned off others from trespassing on it, performed any of the common facts of ownership to it other than walking over and mowing a portion of it, or that he in any way marked off his claimed boundary. *Robinson* v. *Myers*, supra, 518. The defendants were unaware of any claim to the property by the plaintiff until just before suit was instituted in September of 1970. "The requirement that an adverse possession be 'notorious' in the sense of

being or constituting something that is commonly known: well known (Webster's Third New International Dictionary) is obviously to give actual notice to an owner that a claim contrary to his ownership is being asserted or to lay a foundation for a finding of constructive notice." *Robinson* v. *Myers*, supra, 518. The state of the plaintiff's mind is best shown by the fact that on one occasion the plaintiff offered to buy the area from the defendants, although he attempts to explain it away by stating that it was another area leading to another street that he was speaking about, all of which indicates to the court that he did not claim the triangular piece as his own and adversely to the rights of the defendant owners. "The possession of one who recognizes or admits title in another, either by declaration or conduct is not adverse to the title of such other." *Paton* v. *Robinson*, 81 Conn. 547, 551.

On the claim of an easement by prescription the plaintiff again has the burden of proof. In order to perfect an easement by prescription the essential elements are use, open, visible and continuous and uninterrupted for fifteen years and engaged in under a claim of right. *Aksomitas* v. *The South End Realty Company*, 136 Conn. 277, 281; *Klein* v. *DeRosa*, 137 Conn. 586, 588; *Zavisza* v. *Hastings*, 143 Conn. 46, 45; *Andrzejczyk* v. *Advo System, Inc.*, 146 Conn. 428, 431. "A claim of right by prescription must be reasonable. Merwin v. Wheeler, 41 Conn. 14, 25; Lawton v. Herrick, supra. Hence an indefinite user of a tract of land for passage cannot establish a way by prescription. . . ." *Aksomitas* v. *South End Realty Co.*, supra, 281. "A prescriptive right of way cannot be acquired by traveling over land unless the use defines its bounds with reasonable certainty." *Taylor* v. *Denehy*, 136 Conn. 398. "The use must have been so open, visible and apparent that it gave the

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owner of the servient land knowledge and full opportunity to assert his own rights. Ricci v. Naples, 108 Conn. 19, 25; Exley v. Gallivan, 96 Conn. 676, 679. Whether a right-of-way by prescription has been acquired presents primarily a question of fact for the trier after the nature and character of the use and the surrounding circumstances have been considered. . . . Whether the use has been adverse or permissive is likewise a matter of fact to be determined by the trier." *Klein* v. *DeRosa,* supra, 539. See *Gregory's, Inc.* v. *Baltim,* 142 Conn. 296. The evidence clearly indicates that the plaintiff's use of the premises was not so open, visible and continuous as to be the reasonable basis of a prescriptive easement. His claim of using the land eleven to fifteen times a day is less than credible, particularly in view of the testimony of his easterly neighbor, Walter Kreske, that the plaintiff used the easterly side of the premises for passage to and from the rear house about six times a day, and that there are and were trash cans on that side which the plaintiff used as well as a path. In addition the plaintiff does not prove anything more than an indefinite user of the tract, he produced no evidence as to the physical limits of his walking on the area, and his lawn mowers did not agree on the physical area they mowed. The bounds of the claimed prescriptive right were not defined for the court with reasonable certainty. In addition the request by the plaintiff of the defendant to purchase the piece of land, about nine years ago, indicates that he was not claiming the land as his own or that he was claiming a right-of-way by prescription. In addition to all of this if the plaintiff's use of the triangle met all the other requirements of use and maintenance for an easement by prescription, it is found by the court that such use and maintenance were in conjunction with the same use and maintenance by the defendants.

Appendix E

The plaintiff's claim that he had made known his claim to the O'Connors on several occasions is not acceptable to the court. In addition the constructed walk from the plaintiff's rear house led to the easterly side of the premises rather than the westerly side where the prescriptive right is claimed.

The plaintiff has failed to establish by a preponderance of the evidence his claims that he had acquired title by adverse possession to the triangular plot of land abutting his land on the west and belonging to the defendants, and in the alternative that he had acquired a prescriptive right-of-way or easement over the same premises. Judgment may enter for the defendants together with costs of the action.

Levine, J.

Filed: June 21, 1973

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Appendix F

Judgment of Superior Court of Connecticut

STATE OF CONNECTICUT

SUPERIOR COURT—COUNTY OF NEW HAVEN

AT NEW HAVEN

June 21, 1973

No. 124792

CAROL CLEMENT JOHNSON, of the City and County of Albany, State of New York and of Branford, Connecticut,

vs.

JOHN J. O'CONNOR AND ELIZABETH J. O'CONNOR, both of the Town of Branford, County of New Haven.

Present:—

HON. IRVING LEVINE, *Judge.*

JUDGMENT

This action, by writ and complaint dated August 28, 1970, claiming a judgment determining the rights in or to said land and settling the title thereto, came to this Court on the third Tuesday of September, 1970, and thence to May 17, 1973 when the plaintiff filed a substituted complaint, and thence to June 6, 1973 when the defendants filed their answer, and thence to the present time, when the parties appeared and were at issue to the Court, as on file.

Appendix F

The Court, having heard the parties, finds the issues for the defendants.

Whereupon it is adjudged that the defendants recover of the plaintiff their costs, taxed at $125.

By the Court,

HAROLD J. IVEY
Clerk

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MICHAEL RODAK, JR., CLERK

In the

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1437

CAROL C. JOHNSON
Petitioner,

vs.

JOHN J. O'CONNOR AND ELIZABETH J. O'CONNOR
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CONNECTICUT

BRIEF FOR RESPONDENTS IN OPPOSITION

NORMAN ZOLOT
Counsel for Respondents

THE BACK CO., NORTH HAVEN, CONN.

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BRIEF FOR RESPONDENTS IN OPPOSITION

The opinion of the Superior Court is unreported, but is included in the plaintiff's petition for certiorari at p. 14(a). The opinion of the Supreme Court of Connecticut is reported in 37 *Connecticut Law Journal* No. 4 and set forth in toto in appendix to the petition, p. 1 (a).

JURISDICTION

The petitioner claims jurisdiction is involved under 28 USC 1 257 (3), Supreme Court Rule 19 on the basis that a title, right, privilege, or immunity specially claimed under the Constitution of the United States is at issue.

QUESTION PRESENTED

The question presented is whether the action of the Supreme Court of Connecticut in sustaining the trial court's conclusion that the plaintiff failed to sustain his burden of proving the facts and circumstances necessary to establish a right of adverse possession or prescription constituted an unconstitutional taking of the plaintiff's property by a denial of equal protection of the laws and by a denial of due process.

CONSTITUTIONAL PROVISION INVOLVED

Petitioner claims that the judgment made and entered by the Supreme Court of the State of Connecticut is in violation of due process and equal protection provisions of the Fourteenth Amendment of the Constitution of the United States.

STATEMENT OF THE CASE

This litigation concerns the ownership of a small triangular piece of residential property located on Linden Avenue in the Town of Branford, Connecticut. The plaintiff and defendants are adjoining property owners, R. p. 75, and the land in dispute runs the length of their common boundary and is 12.3 feet wide at its base, R. p. 76. The property in question is part of a larger plot of some 200 or more acres which was leased in

1866 for a period of 99 years to a predecessor in interest, who, in turn, entered into various sub leases, R. p. 74. In 1926 the plaintiff's predecessor in interest acquired one of these sub leases, R. p. 76. In 1950 the First Ecclesiastical Church (the owner of the reversion) instituted procedures designed to dispose of their interest at the time of termination of the long-term underlying lease, R. pp. 74-75. The entire tract was subdivided, R. pp. 75-77. In 1952 the defendants grantor purchased the remainder interest in a piece of property which approximated in boundaries the property that they also occupied by virtue of a leasehold, R. p. 50. In 1953 the plaintiff purchased the remainder interest in land which approximated in boundaries the land he occupied by virtue of a leasehold, R. p. 77. Both the deeds of the remainder interest to the plaintiff and the deed of the remainder interest to the defendants contained the following language:

> "It is expressly understood and agreed that said premises are subject to certain leases of record and that the Grantor expressly reserves to itself, its successors and assigns all rights which it now has to receive and/or be paid rent on existing leases and that nothing in this deed shall be in any way construed or interpreted so as to effect or invalidate in any way any of the terms or conditions of said existing leases referred to whether those of the Grantor or others and that the Grantees herein shall to the extent provided by said existing leases continue to pay rent for the terms thereof and as provided therein to the parties entitled thereto." R. pp. 78-79, 82.

On August 25, 1970 the plaintiff (then represented by counsel) commenced an action claiming title by adverse possession (later amended to include a claim for an easement by prescription) in a triangular piece of land included within the

property in which the defendants had record title. A trial, with the plaintiff represented by counsel, was held in the Superior Court in and for New Haven County.

In the course of that trial the plaintiff made claim for title by adverse possession or an easement by prescription with respect to a triangular piece of land 12.3 feet at its base and approximately 163 feet along its easterly boundary, coming to a point, with the other leg of the triangle being slightly longer than 163 feet, R. p. 76, Find. 12; R. p. 77, Find. 18. This disputed triangle was within that portion of the property to which the defendants had record title. The plaintiff made various claims as to the use of the disputed property made by him during the period 1926 to the commencement of suit, including the establishment of a survey line, Draft Find. 11, R. p. 39, cultivation and use, Draft Find. 18, R. p. 41, walking on the property, Draft Find. 44, R. p. 46, use by workmen in repairing his property, Draft Find. 45, R. p. 47, the growing of flowers. Draft Find. 46, R. pp. 47, 48 and the cutting of grass, Draft Find. 47, R. p. 48. However, the court only found that the plaintiff walked across the area in question and that he failed to establish where or on what portion of the area he walked, Findings 38 and 40, R. p. 83, and that he and people in his employ, upon occasion, cut the grass. but that same grass was also cut by the defendants, Findings 41 and 42, R. p. 83. The court also found that the plaintiff failed to pay taxes on the property in dispute, Find. 26, R. p. 80, that he never excluded anyone from the property in question, Find. 44, R. p. 84, that he did not fence in the property in dispute, Find. 45, R. p. 84, that he never leased out the property in question, although he did lease the balance of his property. Find. 46, R. p. 84, that he offered to buy the disputed property from the

defendants, Find. 48, R. p. 84, that he made no claim to the general public that the area in dispute was his, Find. 47, R. p. 84, that there were no physical indicia of his claim and no evidence to mark his claimed boundary, Find. 49, R. p. 84, and that any use he may have made of the property made no visible changes in the disputed area, Find. 52, R. p. 85. On the other hand, the trial court found that the defendants paid the taxes on the area in question, Find. 53, R. p. 85, that the defendants mowed the grass in the area in question, Finds. 54 and 55, R. p. 85, that, until 1969, they maintained a boundary of white stones in the area in question, Find. 56, R. p. 85, that the defendants used the area in question for passage, sunning in their own chairs, making repairs to the house, cooking and just plain sitting, Find. 57, R. p. 85, that the defendants maintained rose bushes and a lilac bush and disposed of dandelions, fertilized and pruned the contested area without interference from anyone, Finds. 59 and 60, R. p. 86, that the defendants ordered the plaintiff off the area in dispute on at least one occasion, Find. 58, R. p. 85. On the basis of this disputed testimony the trial court reached the decision that the plaintiff had failed to establish his case by a fair preponderance of the evidence, Find. 64, R. p. 86. From that decision the plaintiff appealed to the Supreme Court of the State of Connecticut, which affirmed *per curium* the lower court's decision, denied a motion for re-argument and, from those actions of the Supreme Court of Connecticut, this petition was taken.

ARGUMENT

I.

THERE IS NO FEDERAL QUESTION IN ISSUE HERE

The fundamental issue here involves the location of a boundary line that divides two pieces of residential property in the Town of Branford, State of Connecticut. It is undisputed that the disputed triangle lies within the boundaries of a piece of property to which the defendants have record title. The only way that the plaintiff can acquire an interest in that real estate is by adverse possession of prescription. This is controlled by Section 52-575, General Statutes of Connecticut, 1958 Revision, which reads as follows:

> "52-575 Entry Upon Land To Be Made Within Fifteen Years
>
> No person shall make entry into any lands or tenements but within fifteen years next after his right or title to the same first descends or accrues; and every person, not entering as aforesaid, and his heirs, shall be utterly disabled to make such entry afterwards; and no such entry shall be sufficient, unless an action is commenced thereupon and prosecuted to effect within one year next after such entry; but, if any person who has such right or title of entry into any lands or tenements is, at the time of the first descending or accruing of such right or title, a minor, non compos mentis or imprisoned, he and his heirs may, notwithstanding the expiration of such fifteen years, bring such action or make such entry at any time within five years next after full age, coming of sound mind or enlargement out of prison, or his heirs shall, within five years after his death, bring such action, or make such entry and take benefit of the same; provided the limitation herein prescribed shall not begin to run against the right of entry of any owner of a remainder or reversionary interest in

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> real estate, which is in the adverse possession of another, until the expiration of the particular estate preceding such remainder or reversionary estate. (1949 Rev. 8314.)"

The trial court and the Supreme Court of the State of Connecticut predicated their decisions upon the application of the evidence to this statute and the established case law which has developed around it. This is a question of state law. *Donahue* v. *Vosper,* 243 U.S. 59, 65-66; 61 L.Ed. 592, 597; 37 S Ct 350. It is not converted into a question of federal law merely because the plaintiff claims that he was deprived of a title, right, privilege or immunity specially set up or claimed under the Constitution. At no point has the plaintiff established by credible evidence that he had any interest in the land in question. He had a right to bring a law suit, with a hope that he might win. He exercised that right. A trial took place. He did not win. An appeal was taken. He did not win. It has been determined that, as a matter of fact, he failed to establish that he had a property right. If he did not have anything he was not deprived of anything.

II.

The Constitutional Question, If Any, Is Not Properly Raised

No constitutional claims were raised during the course of the trial. The claims of law raised by the plaintiff at the time of trial are set forth in Finds. 83-95, R. pp. 89-93. There are no constitutional questions set forth there. To the extent that the Draft Find. 136, R. p. 69 attempts to raise a constitutional question, the trial court refused to find that such an issue was raised during the trial. Nor was any constitutional question considered by the Supreme Court of the State of Connecticut.

True it is that, after preparation of the appeal papers, in the plaintiff's Assignment of Error No. 14, R. p. 97, the plaintiff attempted to raise such an issue. However, insofar as this assignment concerns the function of the trial court in weighing the evidence and applying the facts to the law, this question was considered by the Supreme Court of Connecticut as a matter of state law and decided as a matter of state law without ever reaching a federal question. *Johnson* v. *O'Connor, et al,* 37 Connecticut Law Journal p. 4, Appendix A, p. 1(a)-2(a) of Petition for Writ of Certiorari to the Supreme Court of the State of Connecticut. In his motion to reargue the plaintiff makes a vague claim of unconstitutionality. Petition for Certiorari, Appendix D, p. 8(a). However, the specificity required by *Herndon* v. *Georgia,* 295 U.S. 441, 443; 79 L.Ed. 1530-1532; 55 S. Ct. 794 is not present. Under these circumstances, there is no federal question to provide a basis for the granting of certiorari. *Beck* v. *Washington,* 369 U.S. 541, 553-54; 8 L. Ed.2d, 98, 109; 28 S. Ct. 955.

III.

The Decision Below Was Clearly Correct

In this case the petitioner is attempting to establish, either title by adverse possession or an easement by prescription. In either event, under the law of the State of Connecticut, he has to establish that his use of the land in dispute was open, visible, notorious, adverse, exclusive, continuous and uninterrupted for a period of fifteen years under a claim of right. *Arcari* v. *Dellaripa,* 164 Conn. 532, 536, 325 A.2d, 280; *Andrzejczyk* v. *Advo Systems, Inc.,* 146 Conn. 428, 431, 151 A.2d, 881; *Aksomitas* v. *South End Realty Co.,* 136 Conn. 277, 281, 70 A.2d, 552. The trial court found that the plaintiff failed to sustain

his burden of proof to persuade the court as to the existence of these ultimate facts. The Supreme Court of the State of Connecticut considered the issues of fact raised by the plaintiff and found that the ultimate conclusion of fact reached by the trial court, that the plaintiff had failed to establish by a preponderance of the evidence his claims that he had acquired title by adverse possession to the triangular plot of land abutting his land on the left and belonging to the defendants, and, in the alternative, that he had acquired a prescriptive right of way or easement over the same premises, was supported by the evidence. *Carol C. Johnson* v. *John J. O'Connor, et als, supra.* This court does not review findings of fact which have been considered by two lower courts. *Dower* v. *Richards,* 151 U.S. 658, 663, 38 L.Ed. 305, 307; 14 S. Ct. 452. The entire question here is a question of proof and a question of credibility and the courts of the State of Connecticut found that the plaintiff failed to sustain the burden of proof imposed upon him.

CONCLUSION

For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari should be denied.

Respectfully submitted,

NORMAN ZOLOT
Counsel for Respondents

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IN THE

Supreme Court of the United States

OCTOBER TERM 1975

No. 75-1437

CAROL C. JOHNSON,

Petitioner,

v.

JOHN J. O'CONNOR and ELIZABETH J. O'CONNOR,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CONNECTICUT

PETITIONER'S REPLY BRIEF

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BLEED THROUGH

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PETITIONER'S REPLY BRIEF

The taking of my property acquired by adverse possession between 1926 and 1954 was a deprivation of property without due process and equal protection of laws and deprived me of my privilege of trial by due process all guaranteed by Section One of the 14th Amendment of the Constitution of the United States to its citizens.

Former Connecticut Chief Justice Maltbie in his highly esteemed work entitled "Appellate Procedure" sets forth at page 205 (second edition) the following (in reference to due process requisites as applied to conclusions):

> "Brief statements of the principle upon which conclusions are reviewed are that they cannot stand if they are legally or logically inconsistent with the subordinate facts or if they involve some erroneous

> rule of law material to the case or if they are unreasonably drawn from the facts found."

And again, page 8:

> "It is error of law for a trial court * * * to find * * * a conclusion not legally, logically or reasonably supported by the facts found."

Although the former Chief Justice was writing as to Connecticut law it is in fact a statement of fundamental law throughout the United States set up as a standard guide as to what constitutes due process and equal protection of the laws.

This principle is set forth and discussed in the case of *Tracy* v. *Ginzberg* (1907) 205 U.S. 170, 178, in the opinion written by Mr. Justice Harlan reading as follows:

> "Within the meaning of that amendment (referring to the 14th Amendment) a deprivation of property without due process of law occurs when it results from the arbitrary exercise of power, inconsistent with 'those settled modes of proceeding existing in the common and statute law of England before the emigration of our ancestors, and which are shown not to have been unsuited to their civil and political condition by having been acted on by them after the settlement of the country.' "

It is to be noted that this statement is set forth in a case that clearly recognizes the principle that state court can adequately deal with a question of ownership of property and its decision cannot be regarded as a deprivation of property without due process of law simply because there is a denial to one or the other of the parties of his claim

to ownership BUT where the decision is based on a denial of due process in the mode of proceeding that IS a matter to be corrected under the Constitutional mandate requiring due process and equal protection of the laws.

Were I to have been deprived of the benefit of a paper or record title by the Court's refusal to consider the testimony as to whether I had acquired a paper title during the 29-year period (1926-1954) erroneously excluded by unconstitutional proceedings in violation of the Constitutional mandate of due process there would be no question that reversal would be in order.

Where I have been deprived of the benefit of title by adverse possession by the Court's refusal to consider the testimony as to my having acquired title by adverse possession during the 29-year period (1926-1954) erroneously excluded from consideration by the unconstitutional proceedings depriving me of due process and equal protection of the laws in violation of the Constitutional mandate of due process and equal protection of the laws and protection of the privileges and immunities provided for therein the case is equally clear that there should be reversal of the unconstitutionally arrived at judgment.

The respondents' attorney's statement in his answering brief that the Court has decided that I acquired no title by adverse possession is in reliance on a judgment unconstitutionally arrived at and involving only a consideration of the period 1954 and thereafter and falaciously testing that period by the standards of attaining title during that period rather than the correct standard of what one need do during that period to retain title after title had been attained between 1926 and 1954—a wholly different standard, even permitting one to travel and leave the premises vacant (which however was not done herein).

The attorney for respondents has tried to minimize what the loss of the triangular strip means to petitioner by setting forth that the base of the triangular strip involved is just 12.3 feet with a length, along the sides, of approximately 163 feet between the houses.

However, the Court's attention is respectfully called to the main brief, page 4, wherein it is set forth that the whole property becomes practically valueless because with the loss of the triangle it becomes impossible to bring in construction machines and material as in the past for repair and maintenance of the front stucco house and the rear guest house and greatly hampers access to the rear of the front house and the rear guest house.

As to the Findings cited by respondents' attorney they were challenged by petitioner as not being supported by the testimony and in his brief in trying to support Finding 46 he was able to cite only testimony that there was an offer to buy property belonging to defendants BETWEEN THE BUILDING but carefully not stated to be within the triangle and the attorney very wisely refrained from pursuing the subject and did not ask the defendants to state whether they meant land BETWEEN THE BUILDING AND WITHIN THE TRIANGLE.

As to the Findings as to the payment of taxes same were challenged as unfounded as both plaintiff and defendant testified that they had no knowledge of the tax records nor as to what measurements were contained in the tax records and same were excluded on the trial.

As to seciton 52-575 of the General Statutes of Connecticut cited on page 6 of the answering brief the defendants on the trial claimed that they were in entry of the triangle during the period covering March 1, 1967 when all leases expired and the reversions became effective but the

record is clear that they never brought suit within one year (by March 1, 1968) to legalize such claimed entry and were therefore forever barred from attacking plaintiff's title. (See the *Fairweather* v. *St. Marylebone Property Co. Ltd.* case reported [1962] 2 All. E.R. 288—House of Lords—affirming [1961] 3 All. E.R. 560—Court of Appeals.)

In that case involving adverse possession by tenants of the same landlord the reversioners legalized their entry by promptly bringing suit but the necessity of prompt suit after entry to legalize the entry was stressed.

Between October 1, 1954 and March 1, 1967 the defendants were merely trespassers in the triangle and when they became reversioners on March 1, 1967 they failed to legalize entry within one year as required by the Connecticut Statute 52-575 quoted in the answering brief page 6.

CONCLUSION

It is respectfully submitted that the judgment should be vacated and the case should be sent back for retrial.

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